

## **Was That Wrong?**

### **What's new or important with the Equal Employment Opportunity Commission in 2017?**

#### **Digital Charge Processing**

In order to improve the efficiency its charge processing, EEOC began using a digital processing system for all charges beginning in 2016. Respondents are notified by email that a charge has been filed. The email address, from which the original notice to Respondent is sent, is the location of the office in which the charge was filed. For example, if the charge was filed in the Louisville area office, the email address would be [Louisville@EEOC.gov](mailto:Louisville@EEOC.gov). The subject line of the email will read, "Notice of Charge of Discrimination". In order to obtain a copy of the charge, the Respondent must log into the Respondent portal as instructed by the email notice. Directions for logging into the Respondent portal, along with a temporary password, are provided in the original email. After logging into the portal for the first time, the Respondent must change its password and should verify the contact information for its designated representative(s). Also at this time, a legal representative may be designated. As in the past, if a legal representative is designated, future contacts will only be made with that designee.

After completing the log in process, a copy of the charge may be downloaded from the portal. The Respondent will see a notice advising that it has 30 days to submit its position statement. If mediation is offered, Respondent has 15 days to respond to the offer of mediation. If mediation is declined or if mediation is unsuccessful, Respondent has 15 days following that date to submit its position statement. Mediation is not offered in every case and EEOC is still using the Priority Charge Processing (PCHP) procedures to determine on which charges mediation will be offered. Consideration is also given, when considering mediation, as to whether the issues of the charge are issues listed as part of EEOC's Strategic Enforcement Plan (SEP). The SEP is posted on EEOC's website, [www.eeoc.gov](http://www.eeoc.gov).

Position statements, as well as attachments, are to be submitted electronically via the portal. Attachments may be designated as confidential and non-confidential. EEOC will determine if the attachments will be considered as confidential. A list of the documents which EEOC will consider to be confidential can be found on EEOC's website in the document titled "Questions and Answers for Respondents on EEOC's New Position Statement Procedures". If requested,

Charging Parties and/or their representatives may now be provided with a copy of the position statement prior to the administrative closure of the charge. Respondent's may use the portal to request extensions for position statements and will be notified through the portal regarding the disposition of their requests. If a charge is amended, the portal is used to advise the Respondent of the amendment.

The Charging Party portal recently became operational. Charging Parties and/or their representatives may now check the status of a charge online. This portal will be expanded in the future to allow other actions to be completed by Charging Parties and/or their representatives.

You may download the Respondent Portal User's Guide along with several fact sheets about the process from EEOC's website, [www.eeoc.gov](http://www.eeoc.gov). The User's Guide provides step by step instructions for using the portal. It gives screen shots of the various screens Respondent's will see when using the portal. The fact sheets are designed to answer typical questions regarding the portal. Specific questions may still be directed to the Investigator to whom the charge is assigned. Contact information for the Investigator is also included in the Respondent portal.

### **Reasonable Accommodation under the Americans with Disabilities Act Amendments Act**

What is considered to be a reasonable accommodation depends on a wide variety of factors. Accommodations must be determined on a case by case basis. A reasonable accommodation is specific to each person's medical condition, his/her job duties and to the Respondent's business. That is why the interactive accommodation process is so integral to determining what is or is not a reasonable accommodation.

There are no magic words an employee must use to begin the accommodation process and employers must be attentive to what employees say to them. Requests for accommodation may also come from family members, medical professionals and/or other individuals who are assisting the disabled individual, such as job coaches or Vocational Rehabilitation Counselors. Training about requests for accommodations is essential for all employees in a supervisory capacity so that they recognize these requests.

The law requires employers to engage in the interactive process. But, how do employers know what that process should be? Using common sense is a good guide during the process. Discussing the essential functions of the job and what help the employee needs in order to perform his/her job duties is a good beginning point for the process. Having accurate and up-to-date job descriptions will assist during this phase of the process. Only essential functions of the job should be considered when accommodation is requested. Employees are often not aware of what accommodations may be available to help them successfully perform their jobs. During the interactive process, possible accommodations should be explored. An employer does not have to provide the accommodation an employee requests. However, the accommodation that is provided must be effective.

Companies may determine how the interactive process works in its facility. The company may designate who is involved in the process and the decision-makers regarding the final outcome. Whatever the process that the company chooses should include the Charging Party in the discussion of the accommodation(s). Some companies and Federal agencies have designated individuals to whom all accommodation requests are submitted. Having this designated representative ensures that all requests are handled consistently and that information about the employee's medical condition is kept confidential. Only individuals with a need to know should be aware of the employee's condition(s). If your company is a union facility, the union representative may also need to be included in the discussions.

Good resources to use, if you are unsure of what accommodations are available, are Vocational Rehabilitation and the Job Accommodation Network (JAN). The website for Jan is [www.askjan.org](http://www.askjan.org). This resource is available 24 hours a day, seven days a week. The contact is confidential and free. The Southeast ADA Center also serves Kentucky. They will answer questions about the ADA by phone or email, provide ADA materials and provide referrals to regional and national experts for specialized assistance. Their website is [adasoutheast.org](http://adasoutheast.org). Vocational Rehabilitation is a great resource in local communities. There may be additional resources within your community that can assist with considering accommodations.

## **Medical Confidentiality**

The ADA requires that medical records be kept confidential. They should be kept apart from general personnel records and only those individuals with a need to know should have access

to the records. Disclosing medical information to someone who has no need to know could be considered to be a violation of the ADA.

Likewise, the Genetic Information Non-Discrimination Act (GINA) also requires that information about an employee's genetic information be kept confidential. If the employer receives genetic information about an employee, the information should be kept separately. It is permissible to keep genetic information with the medical information.

## **Retaliation**

Why are we still discussing retaliation in 2017? In fiscal year 2015, EEOC received 89385 charges. Of those, 39757 (or 44.5%) included retaliation as a basis. For fiscal year 2014, the last year for which individual state charge receipts have been posted, there were 975 charges filed in Kentucky. Of these, 368 (or 37.7%) included retaliation as a basis. As you can see from the statistics, retaliation is alleged in a large percentage of charges filed. EEOC recovered \$173.5 million for individuals who had alleged retaliation as a basis in fiscal year 2015.

On August 25, 2016, EEOC issued Enforcement Guidance on Retaliation and Related Issues. This document was published to supersede EEOC's Compliance Manual Section 8: Retaliation (1998). This document may be found on EEOC's website. Additionally, you may find Questions and Answers: Enforcement Guidance on Retaliation and Related Issues.

Retaliation may occur after an individual has opposed discrimination or participated in a proceeding regarding employment discrimination under one or more of the protected bases. Participation can be for filing a charge, testifying during a proceeding or assisting someone with his/her charge. Opposition is objecting to or complaining about behavior or a practice/policy that an employee considers to be discriminatory. In the case of harassment, the employee who complains does not have to be a member of the protected group who is affected and does not have to be the target of the harassment. The harassment does have to affect the complaining employee's ability to effectively perform his/her job duties.

The three elements of a retaliation case are:

Protected activity: opposition to discrimination or participation in the statutory complaint process;

Adverse action; and

Causal connection between the protected activity and the adverse action.

Timing of the events is one of the primary elements in the investigation for establishing the causal connection. For example, did the Charging Party file a charge and then was discharged shortly thereafter. The resulting adverse action does not have to occur at once, but the timeline is important. All facts and circumstances are considered in each case. The adverse action does not have to be immediate to be considered to be retaliatory.

It is human nature to be offended when accused of discrimination. It's very personal to most people who are alleged to have discriminated against someone else. Retaliation is also part of human nature. Those in supervisory roles must be reminded that retaliation is illegal.

Employees who have opposed discrimination or participated in an investigation are protected under the statute(s). Even if the allegation(s) in the initial opposition or participation charge or complaint were not substantiated, retaliation is prohibited. A Charging Party is never to be adversely affected for exercising his/her protected rights.

There may be retaliation prior to a protected activity if the employer's policy itself discourages the exercise of EEO rights.

Employees who exercise their EEO rights are not shielded from being disciplined for poor performance or misconduct. Employers may take appropriate and consistent action against an employee even if he/she has opposed discrimination, participated in an investigation and/or requested a reasonable accommodation.

The ADA prohibits interference with rights protected by the ADA. Interference is broader than retaliation. The ADA states that it is unlawful to coerce, intimidate, threaten, or otherwise interfere with an individual's exercise of ADA rights, or with an individual who is assisting another to exercise ADA rights. Under the interference provision, a threat does not have to be carried out and an individual does not actually have to be deterred from exercising or enjoying ADA rights in order for the interference provision to be actionable. Some employer acts may be both retaliation and interference, or may overlap with unlawful denial of accommodation.

